

1 LAW OFFICES OF GREGORY A. YATES, P.C.
16830 Ventura Blvd., # 250
2 Encino, California 91436
TEL. (310) 858-6944; FAX. (818) 905-7038

DANIEL C. MORGAN & ASSOC.
4 5851 Thille Street, Suite 103
5 Ventura, California 93003
TEL: (805) 815-4610; FAX: (805) 800-1880

6 Attorneys for Plaintiffs, TOMAS BARRERA, SR., individually and as a Personal
Representative of THE ESTATE OF TOMAS BARRERA, JR.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

11 || MARIA LAZOS et al.

Case No. CV 08-02987 RGK (SHx)

12 Plaintiff,

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION IN LIMINE
NO. 11 TO EXCLUDE EVIDENCE OF
PRIOR CONTACT WITH ANDREW
SALINAS**

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14 | CITY OF OXNARD, et al.

Defendants

16 | TOMAS BARRERA, SR

Date: August 11, 2009
Time: 9:00 a.m.
Courtroom: 850

17 Plaintiff,

18 | vs.

19 | CITY OF OXNARD, et al.

Defendants

22 Plaintiffs, MARIA LAZOS and TOMAS BARRERA, SR., individually and as
23 representatives of the ESTATE OF TOMAS BARRERA, hereby file their Opposition
24 to Defendants' Motion in Limine No. 11 To Exclude Prior Contact With Andrew
25 Salinas.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **THE PRIOR CONTACT BETWEEN SALINAS AND BARRERA SR. IS**
 4 **ADMISSIBLE TO SHOW MOTIVE, INTENT AND PLAN**

5 Fed.R.Evid. 404(b) provides that,

6 *"Evidence of other crimes, wrongs, or acts is not admissible to prove the*
 7 *character of a person in order to show action in conformity therewith. It may,*
 8 *however, be admissible for other purposes, such as proof of motive,*
 9 *opportunity, intent, preparation, plan, knowledge, identity, or absence of*
 10 *mistake or accident..."*

11 The prior incident involving Salinas and Mr, Barrera is relevant to prove
 12 Salinas' motive, intent and plan to shoot decedent, and show a pattern of operation
 13 that would suggest intent.

14 Proof of other crimes has been held admissible to show a common scheme,
 15 plan, design, system, course of conduct, or to establish motive or intent, or absence
 16 of mistake or accident. Parker v. U.S., 400 F.2d 248, 252 (9th Cir., 1968) *citing*
 17 Simons v. United States, 119 F.2d 539 (9th Cir.), Reed v. United States, 364 F.2d
 18 630, 633 (9th Cir. 1966). Rule 404(b)'s terminology of 'other crimes, wrongs, or
 19 acts' includes conduct that is neither criminal nor unlawful if it is relevant to a
 20 consequential fact. U.S. v. Long 328 F.3d 655, 661 (D.C., 2003). The other activity
 21 need not have resulted in a charge or conviction; indeed, the defendant may even
 22 have been acquitted of the conduct, or the conduct may have been entirely lawful. *Id.*,
 23 *citing e.g.*, United States v. Cavin, 39 F.3d 1299, 1311 (5th Cir.1994); United States
 24 v. Ashman, 979 F.2d 469, 492 (7th Cir.1992); United States v. Brown, 961 F.2d 1039,
 25 1042 (2d Cir.1992); United States v. Atwell, 766 F.2d 416, 421-22 (10th Cir.1985).
 26 What matters is that the evidence be relevant "to show a pattern of operation that
 27 would suggest intent" and that tends to undermine the defendant's innocent
 28 explanation. U.S. v. Long, *supra*. The admissible bad acts evidence need not show

1 incidents identical to the events charged, so long as they are closely related to the
 2 offense. *Id.*, citing United States v. DeLoach, 654 F.2d 763, 769 (D.C.Cir.1980).
 3 Relevance is established by any showing, however slight, which makes it more likely
 4 than it was before the admission of the evidence that the defendant committed the
 5 crime in question. U.S. v. Federico, 658 F.2d 1337, 1342 (9th Cir. 1981). The
 6 evidentiary fact offered does not need to have strong, full, superlative, probative
 7 value, does not need to involve demonstration or to produce persuasion by its sole
 8 and intrinsic force, but merely to be worth consideration by the jury. U.S. v.
 9 Kahaner, 317 F.2d 459, 471 (N.Y. 1963).

10 The prior contact with Mr. Barrera is also relevant to proving *Monell* and
 11 supervisory liability, since it shows Salinas' aggression and propensity to use
 12 violence. Prior incidents tend to prove a pattern or custom and the accession to that
 13 custom by the policymaker. Grandstaff, et al- v. City of Borger, et al (1985) 767 F.2d
 14 161, 171, cited in U.S.A. v. Soyland, 3 F.3d 1312, 1318 (9th Cir. 1993); Larez, et al
 15 v. City of Los Angeles, et al, 946 F.2d 630 (9th Cir. 1991). Policy, pattern and
 16 practice can be inferred from prior and subsequent incidents. U.S.A. v. Soyland,
 17 *supra*, 3 F.3d 1318; Oviatt v. Pearce, 954 F.2d 1470 (9th Cir. 1992.) Plaintiffs are
 18 entitled to offer evidence and solicit testimony from various policymakers about what
 19 they knew of Salinas' propensity to use violence, his repeated violent conduct and the
 20 consequences of that conduct, and what, if anything, the policymakers did with that
 21 knowledge. Salinas' aggressive behavior and his propensity to use a deadly weapon
 22 *for a simple traffic stop, in which there has been no attempt to resist or refusal to*
 23 *follow Salinas' commands*, should have alerted the OPD that Salinas was not
 24 qualified to be a police officer and should not be entrusted with a deadly weapon.
 25 Such evidence is relevant to demonstrate the existence of an official policy or
 26 widespread custom of illegal and injurious conduct. Board of County Comm'r's of
 27 Bryan County v. Brown, 520 U.S. 397, 403-04 (1997).

28 A subset of the policy or practice theory of liability for municipalities is one

1 alleging a failure to train municipal employees in the rights of its citizens. See
 2 Mackinney v. Nielsen, 69 F.3d 1002, 1010 (9th Cir.1995) (plaintiff can establish
 3 municipal liability in section 1983 action by showing the municipality made a
 4 “deliberate” or “conscious” choice to fail to train its employees adequately); City of
 5 Canton v. Harris, 489 U.S. 378, 389 (1989) (“the inadequacy of police training may
 6 serve as the basis for 1983 liability only where the failure to train amounts to
 7 deliberate indifference to the rights of persons with whom the police come into
 8 contact.”) Evidence of numerous prior use of force acts involving Salinas is relevant
 9 to show failure to train and discipline Salinas.

10 Furthermore, Chief Crombach’s individual liability is based upon his having
 11 notice of numerous other incidents involving Salinas, and yet, failing to take
 12 appropriate action and/or protective measures to prevent recurrence of such conduct.
 13 Knowingly refusing to terminate a series of acts by others, which a policymaker
 14 knew, or should have known, would cause others to inflict the constitutional injury,
 15 would suffice for individual liability. Larez v. Gates, 946 F.2d 630, 646 (9th Cir.
 16 1991). Individual liability lies for a policymaker’s acquiescence in the constitutional
 17 deprivation, or for conduct showing reckless or callous indifference to the rights of
 18 others. Watkins v. City of Oakland, California, 145 F.3d 1087, 1093 (9th Cir. 1998).
 19 See also Oviatt v. Pearce, 954 F.2d 1470, 1477-79 (9th Cir. 1992). Chief Crombach
 20 had a duty as a Sheriff to prevent continuous and widespread constitutional rights
 21 violations, of which he had actual knowledge.

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II.

CONCLUSION

Based on the foregoing, it is respectfully requested that the motion be denied.

Dated: July 10, 2009

LAW OFFICES OF GREGORY A. YATES, P.C.

~~GREGORY A. YATES~~
Co-Counsel for Plaintiffs,
TOMAS BARRERA, SR., individually and as a
Personal Representative of THE ESTATE OF
TOMAS BARRERA, JR.

Dated: July , 2009

LAW OFFICES OF KIM D. SCOVIS

KIM D. SCOVIS
JENNY SCOVIS
Counsel for Plaintiff,
MARIA LAZOS, individually and as a Personal
Representative of THE ESTATE OF TOMAS
BARRERA, JR.